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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MICHAEL ANDERSON, Plaintiff, v. EQUIFAX INFORMATION SERVICES LLC, a foreign corporation, et al., Defendants.	Case No. CV-05-1741-ST **OPPOSITION OF DEFENDANT TRANSUNION LLC TO PLAINTIFFS' SECOND MOTION TO COMPEL** Date: April 20, 2007 Time: 2:00 p.m. [Declarations of Brian C. Frontino and Donald E. Bradley filed concurrently]

I. INTRODUCTION

Plaintiffs have filed a Second Motion to Compel defendant TransUnion LLC ("TransUnion") to produce documents and, this time, witnesses for deposition. The Motion should be denied because TransUnion has provided all relevant and non-privileged records regarding the claims of plaintiffs Michael and Katrina Anderson ("Plaintiffs") against TransUnion regarding the credit report of plaintiff Michael Anderson ("Anderson"). Moreover, TransUnion already has produced, or has agreed to produce for deposition, every TransUnion employee Plaintiffs are entitled to depose. Plaintiffs' contention that they are entitled to any and all information regarding Anderson's credit report simply is overreaching.

As to the particular documents and deponents sought by this Motion, any testimony that Plaintiffs could elicit from Kathryn Ervin ("Ervin") and Yvonne Miller ("Miller") is protected by the attorney-client privilege. Ervin and Miller became involved with Anderson's TransUnion credit file to assist TransUnion and its counsel with TransUnion's investigation of Anderson's claims after Anderson brought the instant suit for the purpose of assisting TransUnion's counsel in preparing its defense. The entire substance of their potential testimony is, therefore, privileged. Moreover, any documents generated as a result of Ervin's and Miller's involvement in the post-suit investigation were prepared for and presented to TransUnion's counsel and, thus, are both privileged and work-product.

The documents Plaintiffs seek are not discoverable for the additional reason that they potentially pertain to subsequent remedial measures taken by TransUnion, and are thus ultimately inadmissible, and because they are not related to any party's claims or defenses. None of Plaintiffs' claims in the instant action relate to anything that took place after November 2005, making evidence of anything that did take place after that date irrelevant. Plaintiffs' alleged future damages relate to supposed lasting effects of TransUnion's alleged conduct prior to the filing of this action. Plaintiffs have presented no evidence, even circumstantial, or even alleged that anything TransUnion has done subsequent to filing this action that would violate the FCRA.

Because Plaintiffs are attempting to gain access to testimony and documents to which they are not entitled -- and which are used solely for TransUnion's defense against Plaintiffs' claims, and will not be presented as evidence at trial -- the Motion should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Claims

Anderson's father used Anderson's social security number to open various accounts. Anderson allegedly was unaware of his father's actions until sometime in 2002, more than a year after his father's death. Anderson filed the instant lawsuit in November 2005, alleging that TransUnion violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. (the "FCRA"). In January 2007, Anderson amended his initial complaint to add his wife, Katrina Anderson, as a plaintiff and to allege additional FCRA violations. Plaintiffs also sought to add a claim for ongoing but unspecified "future" damages resulting from TransUnion's alleged prior conduct. Soon thereafter, Plaintiffs again sought leave to amend their complaint in an attempt to add yet another FCRA violation -- that TransUnion disclosed Anderson's credit report to unspecified third parties without a "permissible purpose" -- to his list of allegations. On March 27, 2007, the Court granted Plaintiffs' Motion for Leave to Amend, and Plaintiffs filed the Second Amended Complaint later that day. TransUnion filed its Answer to the Second Amended Complaint on April 13, 2007. Nevertheless, all of Plaintiffs' claims in this action are based on events that transpired before November 2005.

B. Discovery At Issue

In the Motion, Plaintiffs seek to compel: (1) production of documents responsive to Anderson's First Request for Production of Documents Nos. 1-4 and 6-9 (the "Requests For Production"); (2) TransUnion's response to Anderson's First Set of Interrogatories No. 9;[1] and (3) the depositions of Ervin and Miller. TransUnion has already produced all of the non-

[1] This request is moot because TransUnion has provided the full name of the third party entity employing one of the dispute processors Plaintiffs seek to depose and TransUnion already has provided Plaintiffs' counsel with the telephone number for Mr. Saravello.

privileged documents responsive to Plaintiffs' Requests For Production. (Declaration of Brian C. Frontino ("Frontino Decl.") ¶ 2.) Further, TransUnion has agreed to produce for deposition the dispute operators who communicated with Anderson or handled aspects of disputes initiated by Anderson, to the extent such operators were not involved with post-filing investigations.

Most TransUnion employees who worked on Anderson's file did so in the regular course of business, and processed Anderson's disputes with TransUnion before Anderson filed the instant lawsuit in November 2005. (Id. ¶ 3.) Different employees only worked on Anderson's file after he filed his lawsuit, at which time TransUnion and its counsel had initiated an investigation into Anderson's claims, using Ervin and Miller, to assist with a very limited portion of the investigation. (Id.) Neither Ervin nor Miller ever worked on Anderson's file prior to this lawsuit. (See id.) Moreover, the only type of work Ervin and Miller have ever conducted relative to Anderson's file was in connection with their assistance in the investigation of his claims at the direction of counsel. (Id.) During the course of this litigation, TransUnion prepared and sent documents to its counsel regarding its post-litigation investigation, including documents generated by tasks performed by Ervin and Miller. (Id. ¶ 4.) TransUnion will not call either Ervin or Miller as trial witnesses, and TransUnion will not introduce the documents generated by their activities and provided to TransUnion's counsel as evidence at trial. (Id. ¶ 5.)

III. ARGUMENT

A. Depositions Of Ervin And Miller Should Not Be Compelled Because The Substance Of Their Potential Testimony Is Privileged.

1. The Substance Of Ervin's And Miller's Potential Testimony Is Protected By The Attorney-Client Privilege.

"Under the attorney-client privilege, confidential communications made by a client to an attorney to obtain legal services are protected from disclosure." Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) (citing Fisher v. U.S., 425 U.S. 391, 403 (1976)). It is well-settled that the attorney-client privilege is meant "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of the law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

Importantly here, several courts have held that internal investigations initiated by attorneys are not subject to discovery. See, e.g., Robinson v. Time Warner, Inc., 187 F.R.D. 144, 148 (S.D.N.Y. 1999) (denying motion to compel production of information connected to internal investigation of plaintiff's allegations because defendant's attorney properly invoked the attorney-client privilege as a shield to discovery); see also U.S. v. Lipshy, 492 F. Supp. 35, 44 (N.D. Tex. 1979) (interviews of company's employees are privileged).

Although Ervin and Miller are dispute processors who often handle ordinary disputes, they never dealt with Anderson's TransUnion credit file prior to the filing of the instant lawsuit. Their task with respect to Anderson's file only was to assist TransUnion's and its counsel's investigation into Anderson's allegations after he filed the instant action. Anything they know and could testify about in this case was revealed to them for the express purpose of guiding their investigation. Everything they did was done at the direction, or as a result of the direction of counsel. Their actions were necessary in order to assist TransUnion's counsel in preparing TransUnion's defense to Plaintiff's claims. TransUnion's attorneys have reviewed and continue to review the documents generated by Ervin's and Miller's tasks, and have offered TransUnion legal advice based upon them. For that reason, TransUnion will not call either Ervin or Miller as witnesses at trial or rely on the documents related to them as evidence. There are no relevant facts, including facts underlying the work they performed, about which they could testify without revealing confidential, privileged information. Therefore, to the extent Ervin and Miller are qualified to testify about the substance of Plaintiff's file or the actions they took at the direction of counsel, their testimony cannot be compelled.

2. Plaintiffs' Argument Is Unavailing Because It Relies On Unrelated Events In A Prior Action And Calls For The Deposition Of Persons Whose Entire Potential Testimony Is Privileged.

Plaintiffs offer the Court one paragraph of argument in support of their desire to depose Ervin and Miller. Without further elaboration or citation to authority, Plaintiffs urge this Court to compel Ervin's and Miller's depositions because "the substance of what happened is discoverable." (Motion at p. 7.) In support of this baseless conclusion, Plaintiffs refer the Court to a page from the transcript of a deposition taken in a prior, completely unrelated lawsuit where TransUnion was represented by alternate counsel. That page features an excerpt from an argument between Plaintiffs' counsel and TransUnion's counsel relating to certain documents demanded by the plaintiff in that case.

Plaintiffs, of course, do not explain how a dispute over the production of documents in a different case supports their position that Ervin's and Miller's depositions must be compelled here. TransUnion submits that the excerpt cited by Plaintiffs bears no relationship to the instant dispute, and does not support Plaintiffs' position in this matter. Completely different documents are at issue here. If they were not different, then Plaintiffs' reliance on any prior position taken by TransUnion might be more compelling. It is not, though.

Moreover, Plaintiffs' assertion that "[t]he time to assert [the attorney-client] privilege, if it exists, is at the time that a question is raised during the deposition where the advice of counsel is involved" (Motion at p. 7) is incorrect. The time to assert the privilege is now, as also demonstrated in TransUnion's concurrent Motion for Protective Order. The entirety of Ervin's and Miller's potential substantive testimony is privileged. Neither of them is in a position to testify about anything of consequence that is not covered by the attorney-client privilege in this case. Therefore, TransUnion will not call either Ervin or Miller at trial. It would be a waste of time and resources to schedule Ervin's and Miller's depositions given the fact that there exists no unprivileged line of inquiry with respect to either of them. (See Frontino Decl. ¶¶ 2-5.)

B. Production Of Documents Related To TransUnion's Internal Investigation Of Plaintiffs' Claims Should Not Be Compelled Because The Documents Are Privileged And Protected By The Work-Product Doctrine.

1. The Documents Are Protected By The Attorney-Client Privilege.

Documents prepared pursuant to TransUnion's internal investigation of Plaintiffs' claims in this lawsuit are protected by the attorney-client privilege. See Upjohn Co., 449 U.S. at 383-84 (holding documents relating to internal investigations of alleged wrongdoing are protected by the attorney-client privilege); see also In re Woolworth Corp. Securities Class Action Litig., No. 94 Civ. 2217 (RO), 1996 WL 306576, at *1 - *2 (S.D.N.Y. June 7, 1996). Moreover, material relating to actions taken by non-attorneys at the direction of counsel falls within the attorney-client privilege. See, e.g., Williams v. Sprint/United Mgmt. Co., No. 03-2200-JWL-DJW, 2006 WL 1867478, at *6 (D. Kan. July 1, 2006) (holding that spreadsheets prepared by non-lawyers at the direction of counsel, for the purpose of obtaining information necessary for the attorney to provide fully-informed legal advice, were privileged).

The documents at issue here were prepared in conjunction with TransUnion's internal investigation of Anderson's claims and prepared for its counsel to assist with preparing TransUnion's defense in this action. That investigation was commenced at the direction of TransUnion's counsel, with an eye towards preparing TransUnion's defense in this case. None of the documents will be entered into evidence at trial. There can be no doubt that the documents are protected from discovery by the attorney-client privilege.

2. The Documents Are Protected From Discovery By The Work-Product Doctrine.

Documents relating to TransUnion's internal investigation are not only shielded from discovery by the attorney-client privilege, but also by the work-product doctrine. The work-product doctrine protects "documents and tangible things … prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney …)." Fed. R. Civ. P. 26(b)(3); see also Admiral Ins. Co. v. U.S. Dist. Ct., 881 F. 2d 1486, 1494 (9th Cir. 1989). Moreover, as the United States Supreme Court has stated:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

United States v. Nobles, 422 U.S. 225, 238-39 (1975).

As noted, the documents Plaintiffs now seek were prepared after Plaintiffs filed suit against TransUnion and for the purpose of assisting TransUnion's counsel in preparing TransUnion's defense. Ervin and Miller, in this particular case, are investigators for and agents of TransUnion. Consequently, the documents generated in connection with their post-lawsuit investigation are protected from discovery by the highly important work-product doctrine.

Plaintiffs' citation to the United States Supreme Court's seminal decision in Hickman v. Taylor, 329 U.S. 495 (1947), does not support Plaintiffs' position here. Rather, the Hickman passage cited by Plaintiffs suggests that material subject to the work-product doctrine may be discoverable, which is consistent with the modern work-product doctrine. Id. at 511; see also Fed. R. Civ. P. 26(b)(3). Clearly, such material is not, by virtue of its existence, necessarily discoverable. Obviously, were that true, the work-product doctrine would not exist.

Instead, "the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production … ." Hickman, 329 U.S. at 512 (emphasis added); see also Fed. R. Civ. P. 26(b)(3) (requiring a showing of "substantial need" and "undue hardship" before documents protected by the work-product doctrine may be produced).

Plaintiffs have not met this burden whatsoever. Plaintiffs assert that they "[are] entitled to know the facts, what happened and when it happened," that "[t]hese documents contain acts by Trans Union" and that "[a]ll changes made to plaintiff's file are relevant to plaintiff's claims." (Motion at p. 3.) Despite Plaintiffs' contentions, the documents simply are not discoverable because they are protected by the attorney-client privilege and the work-product doctrine. TransUnion has turned over every non-privileged document responsive to Plaintiffs' requests. Plaintiffs, therefore, have all the relevant documents to which they are entitled and could possibly need in this case. Plaintiffs are not entitled to privileged documents or information.

Plaintiffs state that "[i]f the documents contain advise [sic] from counsel, such comments can be redacted." (Id.) This suggestion misconstrues TransUnion's position. TransUnion does not claim that the documents are privileged because they contain advice from counsel; rather, the documents are privileged because they were prepared -- pursuant to advice from counsel -- in anticipation of litigation, and for the purpose of assisting TransUnion's counsel in preparing TransUnion's defense. As such, each and every document -- and each and every word therein -- is privileged.

Plaintiffs refer to three prior actions in which their attorney represented other plaintiffs against TransUnion purportedly in support of their accusation that TransUnion "routinely" uses documents against plaintiffs but refuses to produce them. Not only do Plaintiffs mischaracterize the facts of those cases in an inflammatory and inappropriate manner, but their references to these cases are also incomplete and, therefore, misleading.

Plaintiffs allege that in Thomas v. TransUnion, Case No. CV 00-1150-JE, TransUnion used, and on the grounds of privilege refused to produce, name scans. They further allege that Judge Jelderks determined the documents were relevant, ordered them produced and denied TransUnion the ability to use them at trial. (Motion at pp. 3-4.) Plaintiffs misconstrue what happened in Thomas. First, the name scans at issue already existed, a stark contrast from what this Court examined on Plaintiffs' last Motion to Compel in this action where TransUnion had not yet done any name scans. Second, TransUnion's counsel in Thomas was completely unaware that any such name scans existed prior to his preparing a witness for trial and immediately notified Plaintiffs' counsel of the issue. (Declaration of Donald E. Bradley ("Bradley Decl.") ¶ 2.) Only after further discovery was TransUnion precluded from using the name scans, which it did not even intend to use in the first place, at trial. (Id.) In any event, as noted, TransUnion does not intend to use the documents at issue in this Motion at trial.

Plaintiffs' reference to Karmolinski v. TransUnion, Case No. CV 04-1448-AA, and Saenz v. TransUnion, Case No. CV 05-1206-PK, similarly is misleading. Plaintiffs' counsel claims that in each of those cases, TransUnion initially resisted producing certain documents, on the grounds that they were irrelevant and protected by the attorney-client privilege, only to produce them once the plaintiffs in those cases "discovered" them. (Motion at pp. 4-5.) In fact, TransUnion only produced the specific documents as a courtesy, to avoid burdening the court. (Bradley Decl. ¶ 3.) Had Plaintiffs' counsel included the remainder of the discussions excerpted in the Motion, this point would be clear. Here, TransUnion is not in a position to offer any such courtesy, as the documents Plaintiffs seek are privileged and work-product.

Further, Plaintiffs' counsel alleges that in Saenz, TransUnion later acknowledged that the documents at issue in that case were not privileged. The fact is that the documents at issue in Saenz, whatever they may be, and the documents at issue here, are not identical and are wholly unrelated. Even if the Court were to believe, based on the incomplete deposition excerpt set forth in the Motion, that TransUnion waived the attorney-client privilege in Saenz, TransUnion clearly has not done so here. Moreover, TransUnion's counsel in Saenz is not representing TransUnion here, and TransUnion's present counsel firmly believes that the documents at issue in this case are work-product and contain communications from TransUnion to its counsel. Obviously, communications to counsel that are prepared within a document certainly are privileged, and TransUnion has refused and continues to refuse to produce any and all documents protected by the attorney-client privilege and/or the work-product doctrine.

C. Everything Plaintiffs Seek To Compel Is Not Discoverable Because It Is Ultimately Inadmissible As Evidence Of Subsequent Remedial Measures And Is Not Otherwise Relevant.

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party … ." Fed. R. Civ. P. 26(b)(1). To this end, under Federal Rule of Evidence 407, evidence of remedial measures taken subsequent to the alleged harm is inadmissible to prove culpable conduct. Fed. R. Evid. 407. Evidence deemed inadmissible on the basis of the subsequent remedial measures doctrine has been deemed undiscoverable on the same basis. See, e.g., Vardon Golf Co., Inc. v. BBMG Golf, Ltd., 156 F.R.D. 641, 653 (N.D. Ill. 1994) (denying motion to compel response to interrogatory where interrogatory sought information regarding subsequent remedial measures).

Everything Plaintiffs now seek relates to events that occurred after he filed suit against TransUnion and in direct response to his claims. Thus, since the material Plaintiffs seek may relate to subsequent remedial measures taken by TransUnion, none of it ultimately is admissible at trial. Additionally, to the extent any such remedial measures were taken at the advice of counsel, they are privileged. Such information and documents, therefore, are not discoverable.

Lastly, the information Plaintiffs seek is not discoverable because it is not relevant to Plaintiffs' claims. All of the harm allegedly suffered by Plaintiffs took place before the initial complaint was filed in this action in November 2005. Neither of the amended complaints add any cause of action based on events that occurred after November 2005. Therefore, no action taken by TransUnion after November 2005 with respect to Anderson's credit report is relevant. Information related to TransUnion's internal investigation of Plaintiffs' claims is being used by TransUnion's counsel in the preparation of TransUnion's defense in this case. However, because TransUnion will neither call anyone directly involved with its internal investigation as a witness, nor seek to introduce documents generated pursuant to the investigation or relating to changes in Anderson's credit report at trial, none of this information is directly relevant to TransUnion's defense. Therefore, none of it is discoverable.

IV. CONCLUSION

For the foregoing reasons, TransUnion respectfully requests that the Court deny the Motion in its entirety.

Dated: April 16, 2007

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By: /s/
Brian C. Frontino

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TRANSUNION LLC

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Suite 1800, Los Angeles, California 90067-3086.

On April 16, 2007, I served the foregoing document(s) described as: **OPPOSITION TO PLAINTIFFS' SECOND MOTION TO COMPEL PRODUCTION FROM DEFENDANT TRANSUNION LLC** on the interested parties in this action by by providing a true copy thereof to the email address as follows:

Counsel for Plaintiff	
Michael C. Baxter, Esq. Baxter & Baxter, LLP 8835 S.W. Canyon Lane, Suite 130 Portland, OR 97225	Facsimile No.: (503) 291-9172 Email: michael@baxterlaw.com

☐ **(VIA PERSONAL SERVICE)** By causing to be delivered the document(s) listed above to the person(s) at the address(es) set forth above.

☐ **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth above.

☐ **(VIA OVERNIGHT DELIVERY)** By causing such envelope to be delivered to the office of the addressee(s) at the address(es) set forth on the attached Service List by overnight delivery via Federal Express or by a similar overnight delivery service.

☒ **(VIA ELECTRONIC MAIL DELIVERY)** By causing the above listed document(s) to be delivered to the person(s) at the email address(es) set forth above.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 16, 2007, at Los Angeles, California.

Dino Shorté	/s/ Dino Shorté
[Type or Print Name]	[Signature]